Document:-
A/CN.4/SR.1666

Summary record of the 1666th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

33. A rule of international law could not be drafted on the basis of one trend alone; for that reason, the information provided by members of the Commission concerning the procedures to be observed in particular legal systems for a manifestation of will to be regarded as implying reliance on, or waiver of jurisdictional immunity would be very useful.

34. Sir Francis VALLAT, referring to observations made by a number of speakers, said that nationalization could be as much a tool or weapon of the developed countries as of the developing countries. The consequences of nationalization, combined with extensive application of State immunity, in the developed countries could be very serious. For example, in a developed country, a very large oil corporation which, while not nationalized, had very close links with the State, could easily be made an entity of that State. Such a measure would have serious consequences for many developing countries if an unduly extensive application of State immunity was allowed. The nationalization of banks could also have serious consequences, particularly when the banks in question were those dealing with large private accounts, which inevitably had contractual relations having effect in the territory of other States. If such banks became part of a State entity and were accorded immunity from suit in other States in respect of all contractual interests, the consequences for the financial world would be very serious.

35. Consequently, nationalization should not be regarded as a phenomenon occurring solely in the developing countries, but as one which could also occur in the developed countries, with serious effects on the interests of developing countries.

36. Mr. SUCHARITKUL (Special Rapporteur), summing up the Commission's consideration of draft articles 10 and 11, said that a general consensus appeared to have emerged concerning the principle of consent to the exercise of jurisdiction by the court of another State and the various methods of expressing such consent. He hoped to be able to take full account of all the points raised in redrafting the articles for consideration by the Drafting Committee.

37. Referring to observations made by Mr. Jagota, he said that the division of counter-claims into those made by a State and those made against a State was quite useful from the analytical point of view. A counter-claim by a State was an act whereby a State submitted to the jurisdiction of the court of another State, whereas a counter-claim against a State was a direct consequence of an earlier submission to jurisdiction by the State itself. However, as Mr. Aldrich had pointed out, a discrepancy existed between the effects of those two types of counter-claim as far as the question of immunity was concerned. That discrepancy should be eliminated—although section 1607 of the *Foreign Sovereign Immunities Act of 1976*[5] indicated a trend away from that direction in United States legislation.

38. With regard to comments made by Mr. Calle y Calle, he said that the European Convention on State Immunity provided States with the possibility of raising a plea of immunity after they had taken steps in proceedings. Moreover, under some national legislations such a claim could be entered at any point up to the time of judgement.

39. With regard to the question of State intervention, he said that while some terminological amendment might be required, the provision in question was useful, particularly in cases where proceedings were instituted not against a State directly, but against an agency of the State. It would be too simple to infer consent on the part of a State which was far removed from the venue of the proceedings if no provision were made for the possibility of justified State intervention.

40. In the light of the debate in the Commission, he was prepared to regroup draft articles 8, 9, 10 and 11 into one or two draft articles for consideration by the Drafting Committee.

41. The CHAIRMAN suggested that draft articles 10 and 11 should be referred to the Drafting Committee.

It was so decided.

The meeting rose at 12.40 p.m.

1666th MEETING

Thursday, 4 June 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Visit by a Member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, Member of the International Court of Justice and former member of the International Law Commission, whose presence confirmed the longstanding relationship of respect and friendship between the Court and the Commission. He requested Mr. Ago to convey to all the Members of the Court and to its Registrar the best wishes of the Commission.

2. The Commission had the honour of counting among its former members a number of Judges of the

[5] See 1656th meeting, footnote 5.

Court, which had served to draw closer not only personal ties of friendship and affection but also professional ties within the international legal fraternity. The work of the Commission in codifying and progressively developing international law and the work of the Court as the highest judicial organ at the international level were part and parcel of the same aspiration: to promote harmonious and friendly relations between the members of the international community on the basis of international law and justice.

3. Mr. Ago's monumental and untiring service to the Commission through, *inter alia*, his work on the topic of State responsibility had been recognized in a resolution adopted by the Commission the previous year. His visit coincided with the Commission's resumption of its consideration of the topic of State responsibility and, more particularly, that of the second report by Mr. Riphagen on the content, forms and degrees of international responsibility.

4. Mr. AGO said that he was happy to be present when the Commission was about to take up once again Part 2 of the draft concerning State responsibility and to hear Mr. Riphagen, the Special Rapporteur, introduce his second report. He was pleased to note that the topic of State responsibility continued to be a main concern of the Commission and that, through Mr. Riphagen's devoted industry, the work undertaken by the Commission on that fundamental chapter of international law was still highly topical. He also welcomed the fact that Governments were beginning to submit observations on the draft articles relating to Part 1 of the topic of State responsibility.

5. The visit to the Commission of the President or Members of the International Court of Justice had often provided an opportunity to bring up the question of co-operation between those bodies, each of which had as its purpose the subject of international law, its definition, development and application. What had in the past seemed sometimes a formula of mutual courtesy had come to have an extremely real significance. The work of the Commission, particularly its achievements with respect to the law of the sea and the law of treaties, had long been reflected in the judgments of the Court, and it might be thought that it would be so reflected in future judgments. Other achievements of the Commission had been mentioned in the Court's hearings and even in its judgments. In a recent case, many references had been made in the parties' expositions to principles set forth by the Commission with respect to diplomatic law and State responsibility, and the Court had itself referred to those principles in the arguments put forward to support its conclusions. In their turn, the positions adopted by the Court could undoubtedly have an influence on the future work of the Commission.

6. However, there were additional contemporary reasons why co-operation between the Court and the Commission should become even more intense and active. It was essential that the Court and the Commission should co-operate in actually defending the law in the field of international relations. It was by no means unheard of, in current circumstances, for superficial observers to advocate making a kind of distinction between "classical" international law—allegedly old, if not indeed obsolete—and a "new" international law covering new areas and more closely attuned to the recent aspirations and needs of the international community. Those views were unacceptable to anyone with a substantial knowledge of the realities of the life of the international community and its law. International legal rules should certainly be gradually extended to new areas with which the law had not so far been concerned, or had been involved to a limited extent only. Those rules should, however, be carefully thought out and should genuinely meet the acknowledged needs of the whole community. It was essential, in particular, that new rules thus developed should be grafted on to the solid trunk of existing international law. In any event, the Commission had been well advised when, in drawing up its programme, it had given priority to the task of first codifying all the essential branches of international law. That was, moreover, its institutional mandate.

7. The Commission had also had the merit of demonstrating that the codification and progressive development of international law, which it was its object to promote, were not tasks to be pursued separately, but tasks to be carried on together in the definition of all the topics under consideration. Whatever the matter proposed, codification should be both the reaffirmation of the still topical rules of existing law and the affirmation, in the form of gradual development, of the modifications necessitated by the changes in the international community and its way of life. In that approach, there could be no codification without gradual development. It would, in particular, be very dangerous to lose sight of the fact that, following the profound changes that had occurred in the composition of the community of States, it had become both essential and urgent to define anew, and with the participation of all concerned, the old customary law, to redefine it, to supplement it, and to invest it with the clarity characteristic of written, conventional law. On the basis of the fulfilment of that primordial task, it would then be possible to turn attention to the consideration of new matters and to add an organic supplement to the rules inherited from past centuries.

8. He was thus convinced that the Court and the Commission were called upon to co-operate even more closely, not limiting themselves to mere reciprocal borrowing of each other's work, to safeguard international law and the essential function it fulfilled in the life of the international community.

State responsibility (A/CN.4/344)

[Item 4 of the agenda]

The content, forms and degrees of international responsibility (Part 2 of the draft articles)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

9. The CHAIRMAN invited the Special Rapporteur to introduce the draft articles submitted in his second report (A/CN.4/344, para. 164), which read:

Article 1

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

Article 2

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

Article 3

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

Article 4

Without prejudice to the provisions of article 5:

1. A State which has committed an internationally wrongful act shall:

(*a*) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(*b*) subject to article 22 of Part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(*c*) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

Article 5

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (*c*), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(*a*) the wrongful act was committed with the intent to cause direct damage to the injured State, or

(*b*) the remedies referred to in article 4, paragraph 1, under (*b*) are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply.

10. Mr. RIPHAGEN (Special Rapporteur), introducing the draft articles, said that State responsibility constituted only one link in the chain of the process of international law, which extended from its formulation to its enforcement. In theoretical terms, wrongful acts could be regarded as creating a new situation to which new rules would have to be applied, or else they could be seen as acts to be wiped out as far as possible, with measures being taken to prevent their recurrence. In practice, however, the approach adopted fell somewhere between those two possibilities, since in the event of a breach of an international obligation, an attempt was made to find a substitute for the performance of that obligation. In determining the legal consequences of the wrongful act, account must be taken of the concept of proportionality between the act and the response to it. However, such proportionality could only be approximate, given the infinite variety of possible factual situations, of which the wrongful act constituted only a single element.

11. In his report, he had attempted first to define the fundamental structural difference between international law and internal law. Because of the peculiar character of the international community, international law was subject to constraints which did not exist within the framework of internal law. For example, no central authority existed to establish a situation which was in complete conformity with the rules of international law. In that connection, the link between primary rules, rules of State responsibility, and the implementation of State responsibility should be borne in mind.

12. In preparing rules for possible inclusion in a future convention, the Commission was attempting to state the rights and responsibilities of States and to provide guidelines for international courts and tribunals. In that regard, it should be remembered that the legislator was not in the same position as a judge, who dealt with specific situations and acted as a central authority above the interests of the parties concerned. Judges might also be empowered to go beyond what could be provided in a general rule of international law in determining the rights and obligations of the States that were parties to a dispute. Examples of such special powers were those accorded to the tribunal in the *Trail Smelter* case (see A/CN.4/344, para. 42) and those envisaged in article 290 of the Draft Convention on the Law of the Sea.[1] On the other hand, there were many examples of arbitration tribunals lacking the power to award punitive damages in cases in which they were deemed to be warranted. Consequently, care must be taken not to translate into a general rule of international law a

[1] "Draft Convention on the Law of the Sea (informal text)" (A/CONF.62/WP.10/Rev.3 and Corr.1 and 3).

pronouncement made by an international court or tribunal in the exercise of such special powers.

13. Referring to chapter II, section B, of his report, he said that one obvious difference between earlier plans of work and his preliminary report was the emphasis placed in the report on the rule of proportionality. That expression should not be interpreted as meaning a rule which would ensure complete proportionality between a wrongful act and the response to it; such a provision would not be conceivable in international law. It might be preferable to think of such a rule as being intended to prevent disproportionality, by precluding particular responses to particular breaches.

14. In view of the foregoing considerations, he had concluded that it might be useful to begin the draft articles by stating a number of very general principles.

15. The general principle stated in draft article 1, while it might appear self-evident, was nevertheless worth restating, given the different approaches to international law which existed.

16. The principle contained in draft article 3 was the counterpart of that in draft article 1, in that it stated that a breach of an international obligation did not, in itself, deprive the author State of its rights under international law. That principle was of particular importance in modern international law, in which account was taken of the interests of entities other than States, while the rules of international law were still addressed to States. Consequently, it was more necessary than ever to protect the interests of entities other than States if a wrongful act was committed by a State.

17. The principle stated in draft article 2 contained no new element and was in conformity with a statement made by the Commission in its commentary on article 17, contained in Part 1.[2] It would seem useful to state the rule in the body of the draft articles, rather than simply in a commentary, since such special regimes did exist in specific treaties, and since it underlined the residual character of the rules to be proposed in the draft articles. Such special regimes might also exist in customary international law, as had been pointed out in the Judgment of the International Court of Justice in the case *United States Diplomatic and Consular Staff in Teheran* (see A/CN.4/344, para. 59).

18. In chapter II, section D, 1, he had considered the first parameter from the theoretical point of view, and had described the three steps which resulted from the fact that a wrongful act had been committed. Thus, the first step to be taken by the author State was to stop the breach of its international obligation; the second was to make reparation as a substitute for performance of the primary obligation; the third was to restore the situation which the primary obligation had sought to ensure or, in other words, to provide *restitutio in integrum*, *stricto sensu*, including, in principle, retroactive measures. It was, of course, obvious that those three steps depended upon the factual possibilities existing after the breach had occurred. The author State could clearly not undo what had been done and could not reconstitute the past. It had therefore to find a substitute performance.

19. The three steps associated with the new obligations of the author State placed a burden on it, and the question therefore arose whether it had an obligation in all cases to take the three steps discussed in the report, regardless of the nature of the obligation breached. It should also be borne in mind that many rules of international law drew a distinction between the direct rights of a foreign State and the rights the foreign State had in the person of its nationals. From a theoretical point of view, it might be wondered whether the same distinction should be made in respect of the content of the new obligations of the author State arising out of a wrongful act. No doubt because of the many factors involved, it was not easy to find such a distinction in the decisions and awards of international tribunals.

20. Account must also be taken of the qualitative difference between various breaches and of quantitative factors such as the attitude of the author State and the seriousness of its breach. Such factors could influence the decisions to be taken concerning the obligations of the author State and the amount of damages to be paid in particular cases. From the theoretical point of view, the peculiarities of the factual situation and the character of the breach were clearly relevant, as was pointed out in the summary of the analysis of the steps associated with the new obligations of the author State contained in paragraphs 99 to 104 of the report.

21. In chapter II, section D, 3, he had attempted to test those theoretical considerations in the light of judicial and arbitral decisions, State practice and doctrine, on which a great deal of research had already been carried out in connection with the first part of the draft articles.

22. The decisions of international courts and arbitral tribunals were necessarily taken within the special framework of their particular mandate and powers. Such decisions were usually taken long after the alleged breach had been committed, and more often than not they dealt with both the determination of the existence of the breach and its legal consequences. It was, moreover, not always easy to see how international courts and arbitral tribunals arrived at their final decisions, particularly as concerns the amount of damages awarded. In addition, the position of a judge in a specific case was quite different from the attitude which the Commission must adopt in trying to determine *in abstracto* what were the new obligations of the author State.

[2] See *Yearbook ... 1976*, vol. II (Part Two), pp. 80 *et seq.*

23. Accordingly, the Commission might do well to take a closer look at the sometimes sweeping statements made in judicial decisions. It was interesting to note that courts very seldom found *restitutio in integrum, stricto sensu*, including retroactive measures, to be a consequence of a wrongful act. In practice, there were many cases in which an alleged wrongful act by a State gave rise to protests and diplomatic claims by another State and resulted in the adoption by the author State of measures to stop the breach—for example, by releasing persons who had been wrongfully imprisoned or giving back money or goods that had been wrongfully taken—but such measures did not amount, in his view, to *restitutio in integrum*. Indeed, in most cases, courts ordered *restitutio in integrum* only when they were themselves ordered to do so by their statutes or by the powers entrusted to them, as, for example, in the cases decided by the Conciliation Commissions set up under the Peace Treaty with Italy (see A/CN.4/344, paras. 118–119). Thus, if a treaty provided for the restitution of property, rights and interest, the court concerned would, of course, order such restitution, but that was not, in his opinion, the normal case.

24. One recent decision that had gone into the matter was the arbitral award of 19 January 1977 in the case *Texaco Overseas Petroleum Company/California Asiatic Oil Company* v. *Government of the Libyan Arab Republic* (*ibid.*, paras. 120–122). In that case, on the basis of "international case law and practice" and "writings of scholars in international law", the Arbitrator had concluded that he should order *restitutio in integrum, stricto sensu*, which was "the normal sanction for non-performance of contractual obligations" and "inapplicable only to the extent that restoration of the *status quo ante*" was impossible. The principal point made in that award was that *restitutio in integrum, stricto sensu*, including retroactive measures within the territory of the author State, was the normal sanction under international law. Indeed, the Arbitrator in the case had cited Mr. Reuter as having said that *restitutio in integrum* was, in principle, "the most perfect performance possible of the original obligation". That was no doubt true but, for his own part, he was not sure that it was the normal consequence of the breach of a primary rule of international law.

25. In that connection, he was of the opinion that there might be room for another opinion, particularly in view of the primary rule stipulating the domestic jurisdiction of States, which meant that a State, within its own territory, had to decide on the consequences of certain facts. Obviously, however, that rule of domestic jurisdiction could be qualified by an international obligation. The rule of domestic jurisdiction did not prevent a State from accepting an international obligation, but once the obligation had been breached he wondered whether the normal consequence was that there should be *restitutio in integrum, stricto sensu*. That was a matter for the Commission to decide, but, in his view, *restitutio in integrum, stricto sensu* was not a normal consequence of the breach of an international obligation.

26. In paragraph 131 of the second report, he had referred to the power of some courts to order interim measures of protection, which might be of interest to the Commission since, in deciding whether or not to exercise such power, a court might come to the conclusion that an obligation that had been breached might be repaired by pecuniary compensation. In that connection, he drew attention to the Judgment of the International Court of Justice in the *Aegean Sea Continental Shelf* case (*ibid.*, para. 134). In his view, that case involved something akin to *restitutio in integrum, stricto sensu*, because if something could be made good in another way there was no place for interim measures of protection. The few cases in which interim measures of protection had been discussed might provide guidance for the Commission on the question of the new obligations of the State whose act was internationally wrongful.

27. The new obligation of the author State to stop the breach of its international obligation could also be regarded as involving an obligation to take the steps provided for in its internal law in cases of wrongful acts and, in particular, in cases concerning the treatment of aliens. Many possible steps that could be taken under internal law might be applicable in international law, subject, of course, to the rule of the exhaustion of local remedies, which provided that the initiative must be taken by the alien concerned, not by the State which had allegedly breached an international obligation. In general, the rule of the exhaustion of local remedies was, in his view, applicable in respect of the obligations arising for the author State after a wrongful act had occurred.

28. Those considerations had led him to propose draft articles 4 and 5, which should certainly not be considered as final provisions. He would point out that, since the idea of an author State being obliged to inflict a penalty on itself seemed alien to the structure of international law, there was no point in the Commission's discussing the distinction between reparations and penalties. There was also no need for it to deal with the wrongful acts which article 19 of Part 1 of the draft articles[3] had defined as "international crimes" and which had no bearing on the new obligations arising from the breach of an international obligation.

29. Lastly, the matters to which he had referred in paragraphs 160 to 162 of his second report would be dealt with in a later report.

30. Mr. ŠAHOVIĆ, having emphasized the quality of the report and expressed his hope that the Commission would be able to examine the analysis and

[3] For the text of the articles in Part 1 of the draft adopted by the Commission on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

conclusions of the Special Rapporteur in some depth, said that he would like to know what method the Special Rapporteur proposed should be used for the consideration of his report. It might be useful to decide from the outset whether the Commission should first hold a general discussion or whether it would be more efficient and appropriate to examine in turn the various articles proposed, discussing general problems as they arose.

31. Mr. REUTER said that the question of international responsibility was a highly complex one and observed that the topic chosen by the Special Rapporteur, of the consequences of the breach of one of its obligations by a State and the nature of the obligations arising from such a breach, was particularly difficult. However, the topic was not wholly new to the Commission, which had already evaluated its scope in connection with its work on the text of the 1969 Vienna Convention on the Law of Treaties,[4] as was clear from article 60 of that instrument, concerning the termination or suspension of the operation of a treaty as a consequence of its breach. Moreover, even in the field of the theory of the shortcomings of consent, the text of the above-mentioned convention had qualified the consequences of those shortcomings to take account of the requirements of responsibility.

32. At the conclusion of his work on Part 1 of the draft articles, Mr. Ago himself had not hidden the fact that the question of the consequences of responsibility would raise immense difficulties, since those consequences could not be uniform because they depended, first of all, on the number of States affected by the breach. The most recent jurisprudence of the International Court of Justice showed clearly that the importance and number of interests involved modified the consequences of the breach.

33. Moreover, the dignity of the rule itself also modified the consequences of the breach, as could be seen, in positive law, from article 60, paragraph 5, of the Vienna Convention. While it was undeniable that *jus cogens* existed, it should nevertheless be asked whether there were degrees of *jus cogens*. Thus, for example, some obligations might concern the human person (through his family situation, for example), and the question of the effectiveness of *restitutio in integrum* could validly be raised. Lastly, the problem of consequences could have a different aspect according to the matter in which it arose.

34. Like Mr. Šahović, he thought that the Commission should select a method. It stood seized of two preliminary articles and two specific articles, and the Special Rapporteur rightly considered that certain fundamental general rules should be laid down. He himself approved the principle and substance of the three general articles that had been proposed, but noted that it would be necessary to resolve some drafting problems, in particular that of deciding on the wording of the general principles. The Commission should nevertheless decide from the outset of the discussion whether it would first examine the three principles or articles 4 and 5, which were specific in nature.

35. Lastly, he regretted having to recall that, however agreeable it might be, when studying international law, to refer to actual practice by invoking jurisprudence, it should not be forgotten that there was in fact no compulsory international justice, since international justice existed only by consent, that was, on an exceptional basis. It was thus legitimate to wonder whether the Commission should deal in its draft articles with a problem such as that of constraints and obligations at a time when an unduly large number of States reserved their position with regard to international justice. By adopting such an approach, the Commission ran the risk of restricting the general scope of its work, and he was not certain that such a choice would be a fruitful one in the over-all framework of the draft articles.

36. Mr. VEROSTA said he agreed with Mr. Reuter that the Commission should base its discussion of the topic under consideration on the first three draft articles proposed by the Special Rapporteur.

37. Mr. RIPHAGEN (Special Rapporteur) said he, too, thought that the Commission should begin by considering the draft articles which he had proposed. During the discussion the Commission might decide whether the general principles embodied in draft articles 1 to 3 were really necessary and, if so, where they should be placed in the draft articles as a whole.

38. Sir Francis VALLAT said he was of the opinion that the Commission should first discuss the general principles embodied in draft articles 1 to 3 and then go on to consider articles 4 and 5. Such a course of action would enable the members of the Commission to express their general views as might prove necessary.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to begin by considering the first three draft articles proposed by the Special Rapporteur.

It was so decided.

The meeting rose at 1 p.m.

1667th MEETING

Friday, 5 June 1981, at 10.15 a.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Reuter, Mr. Riphagen, Mr.

[4] For the text of the Convention (hereinafter called "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.